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ABSTRACT

This is the eighth report by the Committee on Government Operations in the aftermath of the U.S. Department of Education's (DOE's) December 1990 attempt to ban race-specific scholarships, now called the Fiesta Bowl Fiasco. Based on a study by the Human Resources and Intergovernmental Relations Subcommittee, this report finds the following: (1) race-specific scholarships are legal when used in conjunction with voluntary or involuntary affirmative action as encouraged and affirmed by the Congress and the judiciary; (2) the December 1990 ban on race-specific scholarships was drafted secretly, without the opportunity for public comment, in violation of the Administrative Procedure Act; (3) despite the dubious legal basis of the ban on race-specific scholarships, the Office for Civil Rights (OCR) has begun investigations of schools that use race-specific financial aid in their affirmative action programs. The report recommends that DOE should continue to uphold the legality of race-specific scholarships as an affirmative action tool and that OCR should develop an initiative aimed at stronger enforcement. Included are two dissenting views, one submitted by Representatives Craig Thomas, Frank Horton, and Al McCandless and the other by Representative William H. Zeliff, Jr. (JB)

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102d Congress, 1st Session - - - - - - - - - - - House Report 102-411

THE FIESTA BOWL FIASCO: DEPARTMENT OF EDUCATION'S ATTEMPT TO BAN MINORITY SCHOLARSHIPS

EIGHTH REPORT

BY THE

COMMITTEE ON GOVERNMENT OPERATIONS

together with

DISSENTING VIEWS

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DECEMBER 4, 1991.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, DC, December 4, 1991.

Hon. THOMAS S. FOLEY,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's eighth report to the 102d Congress. The committee's report is based on a study made by its Human Resources and Intergovernmental Relations Subcommittee.

JOHN CONYERS, Jr., *Chairman*

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Union Calendar No. 242

102D CONGRESS *1st Session* | HOUSE OF REPRESENTATIVES | REPORT 102-411

THE FIESTA BOWL FIASCO: DEPARTMENT OF EDUCATION'S ATTEMPT TO BAN MINORITY SCHOLARSHIPS

DECEMBER 4, 1991.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on Government Operations, submitted the following

EIGHTH REPORT

together with

DISSENTING VIEWS

BASED ON A STUDY BY THE HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS SUBCOMMITTEE

On November 13, 1991, the Committee on Government Operations approved and adopted a report entitled "The Fiesta Bowl Fiasco: Department of Education's Attempt to Ban Minority Scholarships." The chairman was directed to transmit a copy to the Speaker of the House.

I. INTRODUCTION

Under the House of Representatives' Rule X, 2(b)(2), the Committee on Government Operations is authorized to "review and study, on a continuing basis, the operation of Government activities at all levels with a view to determining their economy and efficiency." The committee has assigned this responsibility, as it pertains to the Department of Education (DOEd), to the Human Resources and Intergovernmental Relations Subcommittee.

Pursuant to its authority, the subcommittee conducted an investigation of the Department's December 1990 attempt to ban race-specific scholarships.

The subcommittee's investigation included an extensive review of documents related to the scholarship ban and affirmative action

policy. The review also included two public hearings, which were conducted on March 20 and 21, 1991.[1] The following witnesses testified: Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Department of Education; Richard Komer, Deputy Assistant Secretary for Policy, Office for Civil Rights, U.S. Department of Education; Lawrence Gladieux, Washington director, the College Board; Richard Rosser, president, National Association of Independent Colleges and Universities; and Ted Shaw, professor of law, University of Michigan.

II. Background

A. OFFICE FOR CIVIL RIGHTS

The Office for Civil Rights (OCR) is responsible for enforcing Federal laws which prohibit discrimination on the basis of race, national origin, sex, handicap, or age in all education programs and activities funded by the Federal Government.

OCR's jurisdiction is extensive, including all 50 State education and rehabilitation agencies and their subrecipients, nearly 16,000 school districts, 3,300 colleges and universities, 10,000 proprietary institutions, and other facilities, such as libraries and museums.

The agency uses two mechanisms of investigation: (1) the compliance review, which is an unsolicited investigation prompted by information collected from data sources; and (2) the complaint investigation, which is a required review that can only be initiated in response to a complaint from a citizen or organization.

The committee had concluded on two occasions that OCR's enforcement efforts are weak, and that in cases where discrimination had been found, no corrective action had been taken. In 1985, the committee found that OCR and the Department of Justice had failed to obtain remedies in cases where violations of law had been found. In 1987, the committee issued a report concluding that OCR had failed to take action against State governments whose desegregation plans had expired, but who had not eliminated the unlawful vestiges of illegal segregation.

B. RACE-SPECIFIC SCHOLARSHIP BAN

In 1990, the State of Arizona declared that it would not recognize Martin Luther King's birthday, a Federal national holiday. The State's decision was widely denounced. Organizations across the country reacted by canceling major events that had been planned in the State. For example, the National Football League revoked its decision to hold a Super Bowl game in Phoenix.

Another major event set to take place in Arizona was the Fiesta Bowl, an annual football game in which nationally-ranked teams participate. Unlike many other organizations that chose to move their events out of Arizona, the Fiesta Bowl was synonymous with Arizona, and moving it to another location probably would have been impractical, and possibly jeopardized the future of the bowl game.

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[1] Hearings before a subcommittee of the Committee on Government Operations, U.S. House of Representatives, "Department of Education's Race-Specific Scholarship Policy," March 20 and 21, 1991, hereinafter referred to as "Hearings."

In the face of criticism that the game would be scheduled to go on, despite the State's refusal to honor the King holiday, the event's promoters attempted to assuage national concerns by establishing a Martin Luther King scholarship program for participants in the game. Under the program, the Fiesta Bowl would provide the University of Louisville and the University of Alabama, the 1990 participants in the game, $100,000 each in scholarship funds for minority students.

On December 4, 1991, in one of his first actions as the new Assistant Secretary for Civil Rights, Michael L. Williams informed the promoters of the Fiesta Bowl that their plan to award scholarships to the participants in the football game was considered illegal under the Department's new interpretation of Title VI of the Civil Rights Act. Williams' letter to the Fiesta Bowl stated:

> The Title VI regulation includes several provisions that prohibit recipients of ED funding from denying, restricting, or providing different or segregated financial aid or other program benefits on the basis of race, color, or national origin. 34 CFR 100.3(b) (1)–(5) (1989). OCR interprets these provisions as generally prohibiting race-exclusive scholarships. However, a recipient may adopt or participate in a race-exclusive financial aid program when mandated to do so by a court or administrative order, corrective action plan, or settlement agreement. See 34 CFR 100.3(b)(6).
>
> While these prohibitions apply to recipient universities, the Title VI statute and regulation do not apply to the Fiesta Bowl. Assuming the Fiesta Bowl is a strictly private entity that receives no Federal financial assistance, it can award race-exclusive scholarships directly to students. However, the universities that those students attend may not directly, or through contractual or other arrangements, assist the Fiesta Bowl in the award of those scholarships unless they are subject to a desegregation plan that mandates such scholarships.[2]

To emphasize its point, DOEd took the unusual step of announcing its opposition to the Fiesta Bowl scholarship plan in a press release issued the same day the letter was sent to the promoters of the game.

College administrators across the country were astonished by the new ban on race-specific scholarships. The president of the National Association of Independent Colleges and Schools said.

> The progress we have made in increasing the enrollment of minorities was seriously undermined by the announcement from the Education Department's Office for Civil Rights (OCR) that our schools run the risk of violating the Civil Rights Act of 1964 if they award race-specific scholarships.

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[2] Letter from Michael L. Williams, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Department of Education, to John Junker, executive director, the Fiesta Bowl, Dec. 4, 1990.

> The new OCR policy * * * conflicts with the department's appeal to colleges and universities to find ways to enroll and retain minority students. Its endorsement of voluntary affirmative action rings hollow and effectively ties our hands, preventing us from practicing what OCR preaches.[3]

The higher education community was united in its opposition to the new policy, and a firestorm of protest ensued. In response, on December 18, 1991, DOEd modified the policy.[4] The modification delayed implementation of the policy for 4 years and allowed private funds to be used to finance scholarships, but the heart of the new interpretation remained. Colleges and universities still would not be allowed to use their money to fund scholarships.

On March 20, 1991, the morning of the subcommittee's initial hearing into the new policy, new Education Secretary Lamar Alexander announced that DOEd's policy on race-specific scholarships would be reviewed, and that colleges and universities could continue their affirmative action policies that pre-dated the December 4, 1990, ban until the review was completed.

III. Findings

A. Race-specific scholarships are legal when used in conjunction with voluntary or involuntary affirmative action

Since the Supreme Court's *Brown* v. *Board of Education* decision, which ended legally segregated school systems in 1954, and the subsequent onset of court-ordered desegregation, race-specific scholarships have been used as an important affirmative action tool. Their use has been encouraged and affirmed by the Congress and upheld by the Judiciary.

In the Fiesta Bowl letter, DOEd contended that race-specific scholarships are legal only when used in desegregation plans mandated by a court or legislature. The new policy was an incorrect interpretation of Title VI of the Civil Rights Act of 1964, which bars discrimination on the basis of race. While it is true that institutions or State systems of higher education found to have discriminated in the past can be compelled to use affirmative action remedies, neither the Civil Rights Act nor DOEd's Title VI regulations *require* a formal judicially- or legislatively-mandated plan for the implementation of affirmative action. On the contrary, the regulations state that:

> In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.[5]
>
> Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative

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[3] Hearings, testimony of Richard F. Rosser, president, National Association of Independent Colleges and Schools, pp. 46 and 48.

[4] "Department Issues Policy Statement On Race-Exclusive Scholarships," U.S. Department of Education press release, December 18, 1990.

[5] 34 CFR, 100.3(b)(6)(i).

> action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.[6]

The regulations permit voluntary affirmative action, even in the absence of prior discrimination, because, as a matter of policy, the U.S. Government recognizes that it is not overt discrimination alone that creates educational disadvantages for minority students, but also the consequences of discrimination: poverty, schools without adequate resources, entrenched cultural biases.

Much of the discrimination in colleges and universities had been legally mandated by many State governments, which for most of this century operated legally-separate, or *de jure*, systems of higher education. Even in the absence of ongoing discrimination, Federal courts have often ordered desegregation plans because the courts have recognized that minorities still operate at a disadvantage as a result of discrimination that existed decades ago. U.S. policy and law, upheld by Federal courts, requires that where vestiges of segregation remain, they must be eliminated.

In 1969, the United States found 10 States [7] in violation of Title VI because they had operated previously segregated, dual higher education systems, and had not eliminated the vestiges of those systems. When the States were unresponsive to U.S. orders to desegregate, and the Federal Government failed to penalize the violators, the U.S. District Court in Washington, D.C., ordered the Government to act against the States. As a result, desegregation plans were implemented.

The *Adams* order, which had required the Federal Government to enforce civil rights laws, has been dismissed due to the plaintiff's loss of standing, and the Department of Education has allowed the desegregation plans to lapse, even though the plans were unsuccessful and minority students in the States still are at a disadvantage due to the vestiges of illegal segregation.[8] The committee concluded in 1987 that DOEd had not met its enforcement responsibilities when it did not continue to pursue desegregation remedies in the States where the vestiges of discrimination remained.[9]

The principle that the remnants of past discrimination must be eliminated continues to be upheld by U.S. courts, as has the doctrine of voluntary affirmative action. Even the *Bakke* [10] decision did not change this tenet of the law. OCR's long-standing policy interpretation of *Bakke* affirms the principle of voluntary corrective action for past discrimination:

> The Department has reviewed the Supreme Court's decision in *Bakke* and has determined that voluntary affirmative action may include, but is not limited to, the following: consideration of race, color, or national origin among the factors evaluated in selecting students; increased re-

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[6] 34 CFR, 100.3(b)(6)(ii).
[7] Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland, and Virginia.
[8] "Failure and Fraud in Civil Rights Enforcement by the Department of Education," Report by the Committee on Government Operations, October 2, 1987.
[9] Ibid.
[10] *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978).

> cruitment in minority institutions and communities; use of alternative admissions criteria when traditional criteria are found to be inadequately predictive of minority student success; provision of preadmission compensatory and tutorial programs; and the establishment and pursuit of numerical goals to achieve the racial and ethnic composition of the student body the institution seeks.[11]

The committee notes that OCR's published policy interpretation of *Bakke* explicitly permits the consideration of race in pursuing affirmative action. In addition to this policy guidance, the Department's Title VI regulations provide for the consideration of race in applying affirmative action policies:

> Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately serviced. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.[12]

Assistant Secretary Williams acknowledged that race can be a factor in affirmative action, even in the absence of a record of discrimination. He testified, "I think that when there is no discrimination in the past, that race can be a factor, and be deemed to be a factor that is an appropriate factor, and be looked upon by a Federal recipient of Federal funds." [13]

But during the same testimony, he incorrectly said a record of discrimination is necessary before race can be considered in affirmative action plans. In reference to a participant in the Fiesta Bowl, the Assistant Secretary stated, "* * * If the decision is made that Kentucky has complied with the law and is no longer deemed to be a discriminator, they would no longer be in the position of being able to offer race-specific scholarships." [14]

This testimony directly contradicts the DOEd regulations, which state that, "Even though an applicant or recipient has never used discriminatory policies * * * an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available." [15]

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[11] "Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1954; Policy Interpretation," Department of Health, Education and Welfare, Office for Civil Rights, Oct. 10, 1979.

[12] 34 CFR, 100.5(i).

[13] Hearings, testimony of Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Department of Education, p. 5.

[14] Ibid., p. 13.

[15] Op. cit., 34 CFR.

In reference to the *Bakke* guidelines, the Assistant Secretary testified that they encourage affirmative action, "* * * in a specific kind of way, and that would be to use race as a variable among other variables, but not in a race-specific way. You cannot earmark scholarships off to the side, and say, 'These scholarships are for one minority group or the other.' " [16]

The committee finds that the Assistant Secretary's testimony was an attempt to justify a weak legal position. The law and regulations clearly state that (1) voluntary affirmative action is permissible, even in the absence of prior discrimination, and (2) race can be a factor among a variety of affirmative action remedies, financial aid among them.

Regardless of DOEd's inconsistent declaration of policy, the committee finds that there is simply no legal basis for eliminating race-based scholarships. Such scholarships are legal when used as a tool of affirmative action. Federal court rulings and previous OCR decisions support the use of minority scholarships to correct past discrimination, enhance minority representation in schools, and promote a varied student body. Only in cases where school policy, either through the use of scholarships or otherwise, explicitly prevents admission to an institution solely on racial grounds would race-specific financial aid be illegal.

Until the Fiesta Bowl decision, OCR had never found any race-specific scholarship program to be illegal,[17] and had consistently upheld the use of minority scholarships to correct past discrimination, regardless of whether the financial aid was provided voluntarily or mandated by a court or legislature. For example, in 1982, OCR upheld MIT's minority aid program because of Title VI's regulatory authorization of race-specific scholarships. In approving MIT's scholarship program, OCR concluded that *Bakke* did not apply:

> We do not consider it proper to extend the *Bakke* decision from admissions policies to all race-conscious actions by universities. Admissions quotas, the policy at issue in *Bakke*, unlike many other policies, may result in the exclusion of an individual from a university on the basis of race or national origin. The availability of a particular financial aid program does not have such a far-reaching effect.[18]

In 1983, OCR also upheld the minority scholarship program at the University of Denver's Graduate School of Business and Public Management because it did not affect admissions to the school. In its finding, OCR concluded:

> We do not believe that *Bakke* is controlling as to the award of student financial aid, as the decision addresses issued relating only to admissions. It is important to note the distinction between financial aid and admissions. It is

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[16] Ibid., p. 24.
[17] Ibid., p. 5.
[18] *Letter regarding investigation of Massachusetts Institute of Technology*, Burton Taylor, Director, Division of Postsecondary Education, Office for Civil Rights, U.S. Department of Education, March 24, 1982.

> our understanding that students are admitted to the University of Denver Graduate School of Business and Public Management according to ordinary criteria. The issue in this case is not one of exclusion from the school on the basis of race or national origin.[19]

OCR's previous enforcement of Title VI had been consistent with the intent of Congress in creating minority targeted scholarships in various Federal programs, such as the Patricia Roberts Harris Fellowships, National Science Foundation Scholarships, and Minority Honors Training and Industrial Assistance. As recently as 1 month before the new *de facto* regulation banning race-specific scholarships was announced, President Bush had signed into law the Excellence in Mathematics, Science and Engineering Act, which contained financial aid and stated that "women and minorities are significantly underrepresented in the fields of mathematics, science and engineering."

Moreover, OCR's past policy had been consistent with the Internal Revenue Service's allowance of the funding by tax-exempt organizations of minority scholarships, as long as the financial aid program as a whole is not discriminatory.

Federal courts, like OCR, have consistently upheld the right of colleges to provide race-specific financial aid, and in cases where *de jure* segregation had existed, even broader methods of desegregation. For example, in the 1986 decision, *Geier* v. *Alexander*, the U.S. Court of Appeals for the Sixth Circuit approved a settlement between black students and Lamar Alexander, the Secretary of Education who was Governor of Tennessee at the time. The court found that an open admissions system, free as it was of discriminatory practices, was not sufficient to eliminate the vestiges of previous segregation, and necessitated the reservation of professional school admissions slots for black students. The court specifically rejected arguments by the U.S. Department of Justice that the settlement represented a "racial quota," affirming that the settlement was an appropriate remedy for past discrimination.[20]

Even in the absence of a showing of *de jure* segregation or intentional discrimination, the Supreme Court and Title VI regulations support the use of minority targeted scholarships to address underrepresentation of minorities caused by practices that had the effect of limiting minority participation.[21]

The Supreme Court has also upheld Title VI's provisions that allow race to be considered in promoting student body diversity or ending minority underrepresentation, even in the complete absence of a history of discrimination. In *Bakke*, Justice Powell wrote in his majority opinion that diversity was a "constitutionally permissible goal for an institution of higher education." [22] Powell wrote that

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[19] *Policy Clarification re: Title VI and Minority Fellowship Programs at the University of Denver*, Joan Standlee, Deputy Assistant Secretary for Civil Rights, Office of Civil Rights, U.S. Department of Education, March 22, 1983.

[20] *Geier* v. *Alexander*, 801 F.2d 799 (6th Cor. 1986).

[21] *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971), *Guardians Association* v. *Civil Service Commission of N.Y.C.*, 463 U.S. 582, 608 (1983).

[22] Op. cit., *Bakke*.

even admission programs may use race as a criterion in selecting students. His decision did not address financial aid. He wrote:

> The applicant who loses out on the last available seat to a candidate receiving a plus on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname * * *. His qualifications would have been weighted fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.[23]

In *Metro Broadcasting, Inc.* v. *Federal Communications Commission* (citing *Bakke*), the Supreme Court recently held that a diverse student body contributes to an exchange of ideas and is a constitutionally permissible goal on which a university admissions program may be predicated.[24]

There is simply no legal precedent or legislative act that supports the Department's *de facto* regulation. Title VI of the Civil Rights Act, its regulations, and court decisions interpreting it, all allow the use of race-specific financial aid to correct past *de jure* segregation, illegal acts of discrimination, practices that unintentionally result in minority underrepresentation, or the creation of a more diverse student body in the absence of past discrimination. The committee is unable to identify a single system of higher education where at least one of these criteria would not apply.

B. THE DECEMBER 1990 BAN ON RACE-SPECIFIC SCHOLARSHIPS WAS DRAFTED SECRETLY, WITHOUT THE OPPORTUNITY FOR PUBLIC COMMENT, IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

The committee finds the evidence indisputable that the attempted ban on race-specific scholarships was a drastic divergence from existing laws, regulations, and policies, all of which had permitted and encouraged the use of race as a factor in both voluntary and court- or legislatively-ordered affirmative action. The statute, regulations, and policies are clear. In the nearly three decades since the passage of the Civil Rights Act, there had never been any question about the legality of race-specific scholarships. The action of Assistant Secretary Williams on December 4, 1991, reversed the rule of law and gave the Civil Rights Act an entirely new meaning.

In his testimony before the subcommittee, the Assistant Secretary for Civil Rights initially denied that the ban on race-specific scholarships was a change in policy. He denied that the December 4 announcement changed DOEd's interpretation of the Title VI regulations, and claimed it "was not intended to be a policy statement." [25] Yet he admitted that DOEd had never previously found race-specific scholarships to be illegal, despite their decades of use.[26] He finally conceded that a policy change had occurred in the following exchange with the subcommittee chairman:

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[23] Ibid.
[24] *Metro Broadcasting, Inc.* v. *Federal Communications Commission*, 111 L. Ed. 2d 445, 465 (1990).
[25] Hearings, Williams testimony, p. 10.
[26] Ibid., p. 5.

Mr. WEISS. You continued to say that, in fact, your statements during December were not policy changes. The December 18 clarification, issued from your office, is headlined, "Department Issues Policy Statement on Race-exclusive Scholarships." First paragraph: "The U.S. Department of Education, today, announced a six point administrative policy regarding race-exclusive scholarships to prevent disruption to the efforts of colleges * * *." In the face of that, I don't know how you can continue to say that what you announced was not a policy change or policy determination.

Mr. WILLIAMS. I think it is probably fair to say that what I said was, what I announced, on December 4, was not a change in policy. There are, indeed, policy announcements on December 18 that I, on behalf of the Department of Education, announced.

Mr. WEISS. Oh, so the December 18 statement was a policy change.

Mr. WILLIAMS. There is a policy interpretation difference on December 18.

Mr. WEISS. OK. Now, did those policy changes go through all the requirements of the Administrative Procedure Act?

Mr. WILLIAMS. They did not.

Mr. WEISS. No, sir. And not printed in the Federal Register?

Mr. WILLIAMS. They were not.

Mr. WEISS. No public comment?

Mr. WILLIAMS. There was none, other than the free-for-all before, but no, there was not.

The fact that the ban on race-specific scholarships was a change in policy is significant in light of the Administrative Procedure Act [APA]. The purpose of the act is to avoid the type of situation that occurred when the scholarship ban was announced. In this case, public policy was changed without any opportunity for public comment to determine the impact of the change and its legality.

Unless specifically exempted by statute, all Federal regulatory procedures are subject to the strictures of the Administrative Procedure Act. This requirement is buttressed by the Civil Rights Act, which states that, "Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act." [27]

The APA requires that rules be published in the Federal Register *prior* to making them final. The act defines a rule as:

> * * * the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency * * *.[28]

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[27] Public Law 88-352; 78 Stat. 241, Sec. 713(a).
[28] Public Law 79-404, 60 Stat. 237-244, Sec. 2(c).

Historically, OCR had not only adhered to the Administrative Procedure Act's requirements, but had buttressed them with its own policies. For example, in 1978, OCR published notice in the Federal Register that:

> The Office for Civil Rights will hereafter publish all major policy determinations in the Federal Register and systematically provide copies to organizations representing beneficiaries and recipients of Federal financial assistance. Policy determinations will fall into one of three categories: One, policy interpretations will clarify and explain regulatory provisions; two, procedural announcements will outline the specific procedures recipients must follow to comply with regulatory provisions, or the procedures this office will follow to obtain compliance; three decision announcements will illustrate how this office has applied regulatory provisions to specific fact patterns developed through investigations.[29]

Despite this policy, the ban on race-specific scholarships was drafted out of public view, without any forewarning or notice, and then abruptly issued as a binding proclamation. The Assistant Secretary for Civil Rights, testified that he was "not aware" of the requirements of the Administrative Procedure Act, and that publication of the scholarship ban was unnecessary because "it was not intended to be a policy statement." [30]

The Deputy Assistant Secretary for Policy at OCR testified that the 1978 policy to publish policy statements was not binding on the Department of Education:

> Policy decisions by the Secretary of Health, Education, and Welfare, to publish HEW policy in the Federal Register are not, in my view, binding on the Secretary of Education. After the Department of Education was formed in 1980, to the best of my knowledge, no Secretary of Education has published such a notice saying that the Office for Civil Rights would only issue policy through publication in the Federal Register.[31]

The Deputy Assistant Secretary was quite selective in his opinion, for, although he said the publication requirement was not valid because it was published as HEW policy, in another matter involving his criticism of a State of Oregon affirmative action plan, he relied on another HEW policy document to support his views, and he found no problem with the fact that it had been written prior to the creation of DOEd.[32]

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[29] Nondiscrimination in Federally Assisted Programs, Policy Determinations, Department of Health, Education, and Welfare, Office for Civil Rights," Federal Register, May 1, 1978.

[30] Hearings, Williams testimony, p. 10.

[31] Hearings, testimony of Richard Komer, Deputy Assistant Secretary for Policy, Office for Civil Rights, U.S. Department of Education, p. 83.

[32] *Oregon State Board of Higher Education. No. 10902015—Policy Review,* Richard Komer, Deputy Assistant Secretary for Policy, Office for Civil Rights, U.S. Department of Education, Oct. 29, 1990. Mr. Komer cites HEW policy document, *Nondiscrimination in Federally Assisted Programs: Title VI of the Civil Rights Act of 1964; Policy Interpretation.*

The Deputy Assistant Secretary also testified that the race-specific scholarship ban was an interpretative rule, and therefore, would not have fallen under the jurisdiction of the APA.[33]

The committee finds, the protestations of DOEd notwithstanding, that the ban on minority scholarships met the APA's definition of a rule, and was not an interpretative rule, so it could not have been exempt from publication.[34]

The committee finds that the definition of a rule emphasizes its future effect on the interpretation of law. Under the Administrative Procedure Act, any action that prospectively changes how a law is enforced would be a rule, and thus publication in the Federal Register would be required. There is a clear distinction between substantive rules, which require public notice, and interpretative rules, which do not. Substantive rules receive statutory force upon going into effect, while interpretative rules are not legally binding. Interpretative rules are only opinions, and have no impact on the force of law.

The committee concludes that the ban on race-specific scholarships, had it stayed in effect, would have created a new, binding law that had not previously existed, namely that the scholarships would, after a certain date, be illegal. In that the Civil Rights Act had never before been interpreted in such a way—indeed, the historical interpretation had been the exact opposite—the ban on race-exclusive scholarships would have altered future enforcement of Title VI. The ban certainly met the definition of a rule. Therefore, the APA, in this case, required publication of the new interpretation. If DOEd had attempted to enforce the scholarship ban without promulgating the rule according to the requirements of the APA, the ban undoubtedly would have been invalidated by a Federal court.

The initiative to ban race-based scholarships had begun prior to the arrival of Assistant Secretary Williams, who testified that he did not conceive the idea.[35] The Policy and Enforcement Service of OCR had been developing a race-specific scholarship ban, according to testimony, and the idea originated in a suggestion by OCR Region VII in December 1988.[36] That suggestion eventually evolved into a draft document, entitled, *Recipient Provisions of Race- or Gender-specific Aid.* The document's purpose was, "to furnish guidance on when a recipient may provide race- or gender-specific financial aid." [37] In providing a thesis that race-specific aid is illegal, the document recognizes that its premise is a vastly new interpretation of previous policy by informing its readers that, "This memorandum supersedes all prior OCR policy documents on race- or gender-specific financial aid * * *." [38]

Assistant Secretary Williams testified that the draft document had never been sent, but admitted, "That is a policy that was being

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[33] Op. cit., Komer, p. 83.

[34] Sec. 4(1) of the Administrative Procedure Act exempts interpretative rules from publication in the Federal Register.

[35] Hearings, Williams testimony, p. 23.

[36] Hearings, Komer testimony, p. 81.

[37] *Recipient Provision of Race- or Gender-Specific Financial Aid*, Office for Civil Rights, U.S. Department of Education, undated.

[38] Ibid.

developed at the same time as the Fiesta Bowl letter was developed, and it has in it the same legal interpretation that is in the letter." [39]

Legal issues aside, the manner in which the scholarship ban was handled raises serious questions about unfairness to minority Americans, in the committee's view. DOEd officials were aware that race-specific scholarships had never before been declared illegal. They knew the Fiesta Bowl decision would drastically alter the way institutions of higher education across the country would address affirmative action. Yet they refused to assess the impact of their new policy before acting. They insisted on acting secretly.

Even OCR officials questioned the propriety of how the issue was handled. The Deputy Assistant Secretary for Policy at OCR admitted that he had warned the Assistant Secretary against issuing the scholarship ban:

> * * * I indicated that he might want to call the Fiesta Bowl, as opposed to sending the letter. I also told him that I thought we should avoid intervening with respect to the Fiesta Bowl. I told him that I thought the legal position stated in the letter was appropriate, but that I thought we were going to get a significant amount of public interest in what we would have to say, and that I didn't think we were really ready to deal with that. I also advised against, if we wanted to send a letter including a press release, publicizing the letter. I even told him that I thought if we did it that way, we would be in hearings in January.[40]

The Deputy Assistant Secretary for Policy was prescient. The cloak of secrecy in preparing the new rule and the suddenness of its issuance caused a public outcry so great that the Department was forced to withdraw the new rule. And as he predicted, Congress did indeed conduct hearings.

C. DESPITE THE DUBIOUS LEGAL BASIS OF THE BAN ON RACE-SPECIFIC SCHOLARSHIPS, THE OFFICE FOR CIVIL RIGHTS HAS BEGUN INVESTIGATIONS OF SCHOOLS THAT USE RACE-SPECIFIC FINANCIAL AID IN THEIR AFFIRMATIVE ACTION PROGRAMS

According to testimony and DOEd files received by the subcommittee, OCR adopted a policy plan to ban race-specific scholarships before it had announced it in the Fiesta Bowl decision, and before its legality could be assessed in an open forum. The subcommittee's review of OCR's internal documents indicates that the agency was already investigating race-specific scholarships as a violation of Title VI before the December 1990 announcement. Moreover, OCR's policy had shifted from support of affirmative action to using its vast enforcement authority to limit voluntary attempts to correct the vestiges of discrimination.

For example, on January 5, 1990, the Acting Assistant Secretary for Civil Rights, William L. Smith, circulated a memorandum to OCR senior staff entitled, *Investigative Plan for Undergraduate Admissions Compliance Reviews.* The memorandum instructs OCR

[39] Hearings, Williams testimony, p. 8.
[40] Hearings, Komer testimony, p. 96.

staff to use the "disparate treatment theory" in analyzing racial discrimination in college admissions programs.[41] The memorandum explains that the disparate treatment theory is based on the Supreme Court decision, *Connecticut* v. *Teal*:

> In [*Teal*], the U.S. Supreme Court emphasized that Title VII of the Civil Rights Acts of 1964 * * * prohibiting employment discrimination, protects *individuals*, not only groups, from discrimination. The Court repudiated the notion that a "bottom line" racial balance precludes a finding of discrimination. *Teal* held that the employer could be liable for racially discriminatory promotional practices, even if the promotional process resulted in an appropriate racial balance.[42]

Using this approach, "OCR analysis will include consideration of objective and subjective criteria. Even if a disparity in overall admission rates is not found, OCR will examine the effect of the use of each criterion under the disparate impact theory." [43]

More simply, the memorandum outlines a scheme that will determine if college affirmative action plans can be found to be illegal by determining their impact on nonminority applicants. This will not be done on the basis of overall statistical evaluations of racial groups.

This approach has its roots in *Bakke*, but is based on presumptions not delineated in the landmark decision. In *Bakke*, the Supreme Court ruled that qualified applicants cannot be denied admission to colleges on the basis of race alone. The decision was limited to admissions policy that excluded a qualified applicant from admission to an institution. The committee finds OCR's extension of the decision to include affirmative action programs in general, and race-specific scholarships in particular, to be insupportable.

OCR has pursued its new policy with vigor. An early target is an affirmative action program administered by the Oregon State Board of Higher Education. OCR received a complaint about the board's Minority Enrollment Initiative, which grants tuition waivers to minority students who had been traditionally underrepresented in the State's system of eight colleges and universities. The program is limited to black, Hispanic, and American Indian students.

OCR staff found the Oregon plan to be illegal:

> * * * the vast majority of the text of the Initiative, the Staff Report within which the Initiative appears, and the Region's interviews with Oregon officials demonstrate that the actual goal of the Initiative is to increase the enrollment of blacks, Hispanics, and Native Americans.[44]

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[41] *Investigative Plan for Undergraduate Admissions Compliance Reviews*, William L. Smith, Acting Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Department of Education, Jan. 5, 1990.

[42] Ibid.

[43] Ibid.

[44] *Oregon State Board of Higher Education No. 1090215—Policy Review*, Richard D. Komer, Deputy Assistant Secretary for Policy, Office for Civil Rights, U.S. Department of Education, Oct. 29, 1990.

> In order for any affirmative action plan to be legal, OCR staff concluded, "All students must be permitted to participate." [45]

The committee believes this policy can only lead to the elimination of affirmative action programs, which are designed to address the inequitable treatment of minority students, and by their very nature cannot be open to all students. If such a policy became official, it would be the death knell for affirmative action, and one of the most serious setbacks for civil rights in this country since the prohibition against discrimination was enacted in 1964.

The policy is not final. As noted in the files on the Oregon plan, "this cases involves policy issues that are currently being considered by headquarters staff." [46] This admission is evidence that OCR had put into motion enforcement of a policy that had been developed secretly, and understood that the legality of the policy was untested and uncertain. As previously noted, any change in policy of this magnitude would have to be published for comment in the Federal Register, under the requirements of the Administrative Procedure Act.

The committee finds it disturbing that OCR devotes so much attention to investigations of affirmative action plans. The mission of OCR, as intended by Congress, is to investigate illegal discrimination that denies anyone access to education. The affirmative action plans under assault by OCR are intended to redress discrimination. These plans should not be OCR's target; instead, OCR should focus on discrimination that prevents individuals or groups from obtaining an education because of their race, ethnic origin, gender, or handicap. OCR's new emphasis is particularly troubling in light of previous inadequate OCR enforcement efforts that involved the delay of investigative action where discrimination had been found, the lapsing of desegregation plans in States where the vestiges of discrimination remained, and the backdating of documents to provide the illusion that OCR had been diligent in its investigative efforts.[47]

In the Oregon case, OCR's draft investigative report states:

> On May 15, 1987, the [Oregon] Board established the minority student initiative which provides for increased recruitment and provided a limited number of tuition waivers. The initiative is a temporary measure to correct historical underrepresentation of black, Hispanic, and native American student enrollment in the Oregon State public colleges and universities, and was established to create a more culturally diverse student body.[48]

The purpose of the Oregon plan was to promote cultural diversity and correct the underrepresentation of certain minorities. The State's figures showed that 16 percent of Oregon's white high

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[45] Ibid.
[46] Ibid.
[47] *Investigation of Civil Rights Enforcement by the Office for Civil Rights at the Department of Education*, House Report 99-458, December 30, 1985, and *Failure and Fraud in Civil Rights Enforcement by the Department of Education*, House Report 100-334, October 2, 1987.
[48] *Investigative Report, Oregon State Board of Higher Education*, Office for Civil Rights, U.S. Department of Education, July 16, 1990.

school graduates enroll in the State system of higher education, but only 8 percent of black, Hispanic, and Native-American students from Oregon's high schools had enrolled in Oregon colleges and universities.[49]

Oregon appeared to have ample justification for the program, and reason to believe that affirmative action had achieved some of its goals. The State informed OCR:

> Current recruitment efforts have increased the number of underrepresented minority students on our campuses * * *. A diverse student population benefits Oregon in many ways. It creates an environment on campus that is essential for a truly excellent postsecondary education. It strengthens Oregon's economy by expanding the pool of highly educated citizens entering the work force. It promotes social and political stability by fostering better understanding among members of our increasingly multicultural society.[50]

The State also informed OCR that its plan discriminated against no one:

> Although this program will only be available for students from underrepresented groups, it will not reduce the admissions or financial aid opportunities of other students. Furthermore, the program may be expanded to include any protected classes that become underrepresented in the future. The mere absence of discrimination cannot always overcome the effects of past discrimination. When a State has a compelling reason to diversify the student population and uses methods that do not adversely affect the general population, it may consider racial and ethnic characteristics in its affirmative efforts to provide equal access to higher educational opportunities.[51]

OCR's investigation found that white and Asian students, who were not eligible for the tuition waiver plan, represented 95 percent of freshman enrollment in the Oregon higher education system.[52] But because they are excluded from the program designed to help the 5 percent minority of students, OCR concluded that the affirmative action plan was discriminatory.[53] The investigative report admits:

> The Department's Title VI regulation provides that, even in the absence of prior discrimination, a recipient may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.[54]

But it concludes that the tuition waiver program:

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[49] Ibid., p. 8.
[50] Ibid.
[51] Ibid., p. 9.
[52] Ibid., p. 21.
[53] Ibid.
[54] Ibid.

> * * * violates Title VI because the waivers are available to only black, Hispanic, and Native American applicants. Asian and white applicants are not eligible for assistance under the initiative.[55]

The committee finds that OCR has lost track of its own purpose and the intent of the Civil Right Act. The law was intended to outlaw discrimination and provide relief to those suffering from its effects: that is, students who do not have equal access to education. The Oregon affirmative action plan is exactly what Congress had in mind in passage of the act, a program that assists those without access without preventing admission to those who have attained access.

OCR has applied its new, misguided policy to other schools as well. In 1990, OCR initiated a compliance review of affirmative action plans operated by the State of California system of higher education. The investigation, which has not been completed, focused on affirmative action programs that considered the minority status of applicants for admission to UCLA and the University of California at Berkeley Law School.

The UCLA affirmative action plan under investigation by OCR is described in an internal OCR document:

> Under the Master Plan for Higher Education in California, enacted in 1964, the University of California system admits, to some campuses, applicants who rank in the top ⅛ of their high school graduating class. Pointing out the historically very small numbers of minority populations in the university classes, the letter states that in 1983, the University needed to quickly encourage minority students to become eligible and to recruit as many of those eligible as possible to come to the University. To this end, the University adopted the student affirmative action plan which describes a variety of efforts to recruit and retain minority students, provides goals for addressing the problem, and sets up mechanisms to review progress. Although the plan did not guarantee qualified minority applicants admission to the campus of their choice, "shortly after the plan was implemented, the University and the campuses decided to announce a campus-of-choice practice subject to modification based upon experience." [56]

The targets of OCR's investigation at the Berkeley Law School were the school's waiting lists and admissions preference for minorities. While ethnic background was not the sole criterion for admission to the law school, it is among the listed criteria for admission to the law school. Applicants are informed that, "An applicant's racial or cultural minority background may be considered a plus if he or she is a member of a group which has not had a fair opportunity to develop its potential for academic achievement and

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[55] Ibid.

[56] *UCLA Compliance Review, The University of California's Analysis of Its Affirmative Action Program Under Bakke*, Jeanete J. Lim, Chief, Postsecondary Education Policy Branch, Office for Civil Rights, U.S. Department of Education, undated.

which lacks adequate representation within the legal profession." [57]

In response to the OCR investigation, the California Board of Regents explained the justification for their affirmative action plan:

> Any examination of the legal issue presented here must begin, first, with an understanding of what a long and difficult road it has been to attempt to include in our classes more than token numbers of California's large and fast-growing minority populations. As late as 1968, a mere 2.8 percent of Berkeley undergraduates were black and 1.3 percent Hispanic. Comparable figures were no doubt even worse on other campuses. When the current five-year undergraduate student affirmative action plan was adopted, the representation of black and Hispanic students within the University was still only 3.9 percent and 6.1 percent respectively. This at a time when the demographic revolution now transforming California was moving rapidly toward a situation where the richest and most populous state would no longer have a white majority and at a time when the high school graduation rate for black and Hispanic students was 8.2 percent and 15.7 percent respectively. Obviously, a state university which so disproportionately excludes from its ranks students soon to make up a majority of the population groups in the state could not claim to be offering to its students the kind of diversity required to meet the educational goals of the University and could not expect continued taxpayer support.[58]

As further evidence that OCR had adopted a policy to target affirmative action plans, the Deputy Assistant Secretary on May 1, 1990, asked the OCR regional office in Atlanta to consider conducting a compliance review of Florida Atlantic University, which had been offering scholarships to any black students who qualified for admission to remedy a severe underrepresentation of blacks among its student body.[59] Compliance reviews are unsolicited investigations of matters OCR considers to be a priority. According to the Deputy Assistant Secretary, the idea for the compliance review came from the same policy review team within OCR that had developed the policy to ban race-specific scholarships.[60]

The goal of these and other voluntary affirmative action plans is the establishment of diverse student bodies representative of their respective populations in each state. Ironically, the *Bakke* case, which OCR wields as a club against affirmative action, supports diversity. In his majority opinion, Justice Powell noted that diversity, "* * * clearly is a constitutionally permissible goal for an institution of higher education * * * the freedom of a university to make its own judgments as to education includes the selection of its student body * * *." [61] In *Bakke*, the Court ruled that not admitting

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[57] *University of California at Berkeley Law School*, Gary Jackson, Regional Civil Rights Director, Region X, Office for Civil Rights, U.S. Department of Education, March 21, 1990.

[58] *Letter to OCR Region X*, Gary Morrison, deputy general counsel, California Board of Regents, Oct. 17, 1989.

[59] Hearings, Komer testimony, p. 85.

[60] Ibid., p. 82.

[61] *Bakke*, Opinion of Justice Powell.

an eligible student to a school solely on the basis of race is illegal. Yet in its investigations of affirmative action programs, OCR did not identify a single student who had been excluded from admission due to race.

If OCR succeeds in its assault on affirmative action, the consequences will be devastating for minority students in the United States. They still lack equal access to education; they still lag far behind white students.

In 1987, the subcommittee reviewed internal OCR documents pertaining to 10 States that, at the time, were under OCR-mandated higher education desegregation plans. All the States had operated previously *de jure* segregated systems of higher education. The committee's report of that investigation concluded that none of the States had eliminated the vestiges of illegal segregation.[62] One OCR document, prepared by the Director of Policy and Enforcement, perhaps summarized the situation best when it noted that the 10 States, "have not heretofore even approximated what might be considered the elimination of the vestiges of dual systems."[63]

The report found that the disparity between white and black student entrance rates in the States had generally widened over the course of the desegregation plans, and that great disparities between blacks and whites existed in attrition rates, graduate school admissions, and employment.[64]

The situation continues to worsen. The American Council of Education reports:

> Although the high school graduation rate of blacks now approaches that of whites, disparities persist in every objective measure of African American college participation. While 38.8% of white 18 to 24 year old high school graduates were enrolled in college, only 30.8 percent of the African American group were. While 55.8% of white college students attained a baccalaureate degree after 5½ years, only 30.3% of black students did. The proportion of bachelor's degrees received by blacks fell from 6.4% in 1976 to 5.7% in 1989, master's degrees from 6.8% to 4.6%, and doctorates from 3.3% to 2.4%. The absolute numbers fell as well. The percentage of professional degrees received by African Americans was virtually unchanged in the period (4.3% to 4.4%).[65]

The Department's own National Center for Education Statistics also reports that, overall, the percentages and numbers of black students receiving higher education degrees have dropped in the 10-year period 1978 to 1988.[66]

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[62] Report, Oct. 2, 1987.

[63] *Fall 1985 Expiration of Current Plans of First Tier States*, Frederick T. Cioffi, Acting Director for Policy and Enforcement Service, Office for Civil Rights, U.S. Department of Education, Nov. 15, 1984.

[64] Op. Cit., Report.

[65] *Ninth Annual Status Report, Minorities in Higher Education*, American Council of Education, January 1991.

[66] *Race/Ethnicity Trends in Degrees Conferred by Institutions of Higher Education: 1978-79 through 1988-89*, National Center for Education Statistics, U.S. Department of Education, January 1991.

Without minority financial assistance, the numbers would be even bleaker. Fully 82 percent of black undergraduate students in private colleges receive some financial assistance, as do most Hispanic and Asian students. All are not in the form of race-specific scholarships, but eliminating this type of financial aid would certainly reduce the number of minority students admitted to universities and colleges.

IV. Recommendations

A. DOED SHOULD CONTINUE TO UPHOLD THE LEGALITY OF RACE-SPECIFIC SCHOLARSHIPS AS AN AFFIRMATIVE ACTION TOOL

DOEd is intent on changing the meaning of the law and interpretation of its own regulation by banning race-specific scholarships, concluding that they are a violation of Title VI of the Civil Rights Act. The subcommittee's investigation shows that the plan to ban this type of financial aid had been in formulation for several years prior to its announcement in December 1990. The ban was withdrawn only after an enormous public outcry from students, educators, and the Congress.

But that withdrawal was in the form of a moratorium established by the new Secretary of Education, who said he planned to study the issue. On May 30, 1991, DOEd published a notice of request for comments in the Federal Register, soliciting information on "Student Financial Aid Programs in Which Race, Color or National Origin is a Factor." [67]

The act of publishing the Federal Register notice,which, unlike the December 1990 action, is in keeping with the Administrative Procedure Act, is in itself a sign that DOEd will continue its misguided and illegal effort to ban race-specific scholarships. There would be no need for such an action if the Department planned on maintaining the *status quo*.

The language of the notice is also indicative of DOEd's intentions:

> The Assistant Secretary is publishing this notice of Request for Comments to solicit from all interested parties written comments on student financial aid programs in which race, color, or national origin is a factor and, in particular, the constraints, if any, that title VI of the Civil Rights Act of 1964 * * * imposes on those programs. These comments are intended to provide the Secretary and the Assistant Secretary with the most comprehensive information possible on this issue, including information on the nature and extent of the financial aid programs, the reasons underlying the programs, the limitations that may be imposed on the programs by title VI, and the feasibility of alternative methods of promoting higher education opportunities for members of minority groups.[68]

Why is the Department soliciting information regarding how race-specific aid is limited by Title VI? No laws have been passed

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[67] *Notice of request for comments*, Federal Register, May 30, 1991.
[68] Ibid.

limiting Title VI in regard to race-based scholarships. Although there have been Supreme Court decisions about affirmative action in recent years that may affect the interpretation of civil rights laws as to the burden of proof in discrimination cases, there have been no landmark cases that could change enforcement of Title VI in regard to affirmative action in higher education since *Bakke*, and the Department made its policy interpretation of that decision 12 years ago.

The Federal Register notice of May 30 asks nine questions regarding race-specific financial aid. Several of the questions solicit information about the need for and extent of financial aid, which are useful inquiries. But other questions appear biased and rooted in a political agenda that has little to do with civil rights law enforcement. For example, the following question is asked:

> Should financial aid programs be analyzed for consistency with title VI in the same way as the Supreme Court analyzed admissions in [*Bakke*]. In *Bakke*, the Court held that a university's setting aside of certain medical school admission slots for minorities violated title VI, but that the school could lawfully consider race as a "plus" factor in an individual's file (considered along with other objective and subjective factors) in order to promote a diverse student body contributing to a robust exchange of ideas. Should the same line be drawn regarding financial aid. Are there any material differences between admissions programs and financial aid programs that would make financial aid programs outside the scope of *Bakke*? [69]

The committee finds the question leading and biased. It offers a narrow interpretation of *Bakke* and improperly tries to draw a connection between admissions programs and financial aid affirmative action programs, an association that had not been made by the Court.

The very fact that DOEd seeks information on *Bakke* 13 years after the decision was rendered is an indication that the motive behind the race-specific scholarship ban is political. The law has not changed in those 13 years, nor have OCR's legally promulgated regulations. But the cast of characters has changed, and it is this new cast who are attempting to usurp the authority of Congress and the Judiciary, with whom the responsibility lies for enacting laws, in the case of the former, and interpreting them, in the case of the latter.

The committee strongly urges the Department to cease its activity aimed at ending the availability of scholarships for minorities.

B. OCR SHOULD DEVELOP AN INITIATIVE AIMED AT STRONGER ENFORCEMENT

OCR's record of law enforcement has been abysmal. The subcommittee's previous reviews of the agency found that it rarely enforced the law. In its 1985 report, the committee found that, from 1981 to 1985, OCR found 2,000 violations of law, but issued only 27

[69] Ibid.

notices for hearings, and referred only 24 cases to the Justice Department. The committee noted that a large majority of violations had been settled voluntarily.

OCR's refusal to enforce the law resulted in an unusual order from a Federal court. From 1977 until 1988, OCR was virtually controlled by the *Adams* decision, a U.S. Court order issued because OCR had refused to use its enforcement authority where illegal discrimination had been found.

The *Adams* case began in 1969 when OCR sent letters to 10 southern and border States informing them that they had failed to eliminate the vestiges of racial segregation in higher education. Five States ignored OCR's letters, and the other five submitted inadequate desegregation plans.

OCR did not require the States to desegregate. On July 3, 1969, the Department of Health, Education and Welfare and the Justice Department jointly announced a new policy to minimize the number of cases where Federal funds are cut off from schools in violation of Title VI. The policy also revoked previous Title VI deadlines for complete desegregation by the 1969 school year. OCR had made it clear: it would not take action against illegal segregation.

The NAACP Defense Fund, on behalf of clients in the segregated States, sued OCR to force enforcement. The case took years to evolve, and in 1977, a settlement was negotiated that culminated in a Consent Order. Time-frames procedures were established for the investigation of discrimination complaints. The government fought to have the order overturned, and while the arguments were heard by the court, OCR refused to take action in other old cases where violations of law had been found. In 1983, the court ordered OCR to resolve the backlog of cases.

The committee's 1985 report on OCR found that, after the 1983 order was issued, OCR used new and innovative methods to circumvent the order. One such ruse involved referring cases to the Justice Department, which was not covered by the *Adams* order. In 1985, 24 cases, nearly half the pending enforcement caseload at OCR, had been referred to the Justice Department. The cases were as old as 6 years, yet none of the findings of illegal discrimination had been addressed.

In 1987, the committee found that OCR was continuing to violate the *Adams* order, this time by backdating documents to make it appear that investigations were being pursued according to the order's time frames. Moreover, the committee found that OCR had allowed the desegregation plans in the 10 States that prompted the *Adams* case in 1969 to lapse, despite the fact that the vestiges of illegal segregation in those States had not been eliminated.

The *Adams* order was dismissed when the court ruled that the original plaintiffs no longer had standing. Since that time, OCR has not only renewed its policy of not enforcing the law where violations are found, but is using its enforcement authority to attack civil rights laws and policies. Instead of ferreting out discrimination and correcting it, the office is engaged in a battle to eliminate remedies for discrimination.

The committee strongly urges OCR to end its assault on civil rights, and begin its assault on discrimination.

DISSENTING VIEWS OF HON. CRAIG THOMAS, HON. FRANK HORTON, AND HON. AL McCANDLESS

The responsibility of the Department of Education, specifically its Office of Civil Rights, to ensure equal educational opportunities for everyone in this country regardless of race, creed, color, sex or national origin, is probably its most important job. Our ability to compete into the 21st century will not be determined by federal standards on the size of schools, the types of text books we should use or the notions of some bureaucracy located in Washington. It can only be guaranteed if we get as many people through higher levels of education as possible to share their experiences and learn from others.

The report offered by the majority offers a distorted view of the actions of the Department of Education on this issue. Under the guise of ensuring the Department was following proper procedures, this report is designed to accuse President Bush, Secretary Alexander, and officials in the Department of a conspiracy to deny educational opportunities to minorities. It is a partisan political document, not an attempt to review the "efficiency and economy" of a government department, the supposed mission of this Subcommittee.

In November, 1990, officials of the Fiesta Bowl, a college football game played annually in Arizona, were faced with a dilemma. A referendum to create a state holiday to honor the late Martin Luther King was defeated by the voters of the state. Due to ensuing political pressures, many conventions decided against holding their meetings in the state. The National Football League canceled its plans to hold the Super Bowl in Phoenix. Many universities, under pressures from students, faculties and contributors, rejected the opportunity to play in the Fiesta Bowl, threatening the prospects for the game.

In an effort to lure two highly ranked teams (the Universities of Alabama and Louisville) to participate in the game, they offered an additional incentive of $100,000 to each school for the purpose of funding minority-specific scholarships. This was done in spite of the fact that these officials and the organization had no history of prior discrimination.

On December 4, 1990, Mr. Michael Williams, Assistant Secretary for Civil Rights, sent a letter to these officials to raise his concerns as the Department's chief civil rights officer. Specifically, his letter expressed his *personal* belief that the language of the program as set up by the organization was in violation of Title VI of the "Civil Rights Act" which prohibits all programs that create discriminatory programs when no prior history of discrimination existed. Since the Fiesta Bowl and its organizers had never discriminated, and because Arizona was not considered by law as a state that was under

special scrutiny by the Justice Department, a violation technically existed.

What was glossed over and ignored by the majority, the press, the educational community and civil rights groups was the offer by Mr. Williams to work with these officials to create a program that achieved the stated goal (increase minority attendance in colleges and universities) and fall within the language of the law. His intent was to help the process, not hinder it.

Through a pattern of misinformation and disinformation confusion as to the supposed problem and the proposed solution caused hasty and somewhat contrived decisions on the part of school administrators and civil rights activists to claim minority-specific programs must be stopped. In an effort to prevent further confusion on this issue, Acting Secretary Sanders issued a press release on December 18th urging all colleges and universities to make no changes in then-current policies until all parties could clearly discuss the issue. The majority, in their report, incorrectly defines this as a formal change in departmental policies.

On March 20, 1991, the morning of the Subcommittee's hearing, new Secretary Lamar Alexander ordered a wide ranging study to determine exactly what programs (scholarships and others) currently operate to ensure minority attendance in post-high school education, how successful these programs have been, and what if anything needed to be done to make them work better. Secretary Alexander is well respected in the education community for his reforms instituted while serving as governor of the State of Tennessee and president of that state's largest university. Subcommittee Chairman Weiss made a point of acknowledging this fact during the hearing.

As a way of trying to prove a pattern of discrimination on the part of the Reagan and Bush Administrations, Chairman Weiss inserted into the record statistics showing a decline in the percentage of blacks and other minority groups receiving undergraduate, graduate, and professional degrees. The majority implied this was "de facto" proof of a pattern to deny opportunities. However, they specifically failed to address the actual number of students attending these colleges and universities, the increasing problems of minority dropouts in high school and college, the number of dollars (public and private) available for scholarship programs, mismanagement within these programs, and the increasing costs of a college education exceeding inflation rates over the last decade. To the majority it was simple . . . a decreasing percentage of minority degrees HAD to indicate a pattern of discrimination regardless of facts.

The majority insinuated during the hearings that Mr. Williams, who happens to be an African American, was nothing more than "window dressing" in the Department. They further implied that these decisions were being orchestrated through a collaboration between lesser grade white officials and a conservative public interest group.

In fact, Mr. Williams has an impressive record of successfully prosecuting criminal and civil violations of the "Civil Rights Act," specifically detailing 17 individuals he convicted and placed in jail.

The majority stated in their report that the way questions were asked in the notice for comments placed in the *Federal Register*

was "de facto" proof of an intent to set up a decision to deny minority scholarships in the future. This is unfair. The majority's chief complaint during the hearing was their belief that Mr. Williams and others in the Department had violated the "Administrative Procedure Act" in making their various decisions and announcements. Yet, when Secretary Alexander specifically sets up a much needed plan to study an important issue, and does it wholly within the scope of the regulations, the majority finds another reason to find fault.

If the percentages of minorities achieving higher levels of education cited by the majority are true, then a serious problem exists. The procedure announced by the Secretary will ensure that all views will be heard on this issue. We have a responsibility to allow the process to continue instead of trying to pre-bias the report. The Secretary should be commended for his motives and his efforts. The majority's argument is a clear indication that they are more interested in demagoguery on an issue than discussing the "efficiency and effectiveness" of a government agency or department.

Finally, the majority's argument that the investigations in California, Colorado, Florida and Oregon are proof that some unknown persons within the Department are collaborating with outside groups to deny scholarship opportunities is without merit.

With the exception of two of the three California cases, all of these investigations dealt with programs within the universities, specific colleges, or enacted by state legislatures which specifically benefitted one minority while excluding all others. The Department *is required by law* to investigate all complaints of discrimination that are formally filed with the Office of Civil Rights. After complaining that the Department was failing to follow the law and enforcing the "Civil Rights Act," the majority now uses their adherence to the law as an indication of some devious intent.

Two of the California cases were begun as part of a compliance review because officials within the Department had concerns about the intent of the programs and their outcomes. This is an oversight responsibility that is no different than this subcommittee's oversight reponsibility. On many occasions, this subcommittee has initiated investigations as a result of an article in a newspaper or a story on the news . . . or as a direct result of concerns voiced by various special interest groups. This is a legitimate action. Implying a devious attempt on an oversight action by a federal agency or a Congressional committee or subcommittee is not something we should engage in. It could come back to haunt us.

President Bush, Secretary Alexander, Assistant Secretary Williams and other officials within the Department of Education are committed to equal educational for everyone in this country. The majority's insinuation of racist intent on the part of this Administration is not only without foundation, but it sets a dangerous tone for the upcoming political season. This subcommittee, as well as the entire Congress, should resist the majority's urge to take this road.

CRAIG THOMAS.
FRANK HORTON.
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DISSENTING VIEWS OF HON. WILLIAM H. ZELIFF, JR.

Mr. Chairman, I am in opposition to the adoption of the report, "The Fiesta Bowl Fiasco: Department of Education's Attempt to Ban Minority Scholarships."

I reject the politicization of the proposed scholarship program by the authors of the report. The record of Mr. Williams' actions has been distorted, misinterpreted and erroneously reported.

His detractors, the naysayers among the media, among civil rights activists and among the Democratic Party, have wrongly characterized his actions as an attempt by the Bush Administration to deny educational opportunities to minorities. In fact, Mr. Williams boldly took the initiative to counsel activist organizers of the Fiesta Bowl about how to increase educational opportunities for minorities under existing law. He tried to ensure that a minority scholarship program that would not violate Title VI of the Civil Rights Act could be established by the organizers of the Fiesta Bowl. To that extent, Mr. Williams offered only advice about a rewrite of the scholarship plan; no policy change was being instituted.

Because of the progressive assistance that the Bush Administration has offered to groups organizing scholarship programs, scholarship programs that meet the letter and intent of federal law have been organized. I applaud Mr. Williams for his initiative in counseling the organizers of the scholarship program.

President Bush, Secretary Alexander and Michael Williams all have backgrounds and records that support equal educational opportunities for all, regardless of race, creed, color or sex. The question that this subcommittee faces is whether Mr. Williams followed the Rules and Regulations of the Department. I believe that he has followed the Rules and Regulations.

BILL ZELIFF.

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